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In The

Supreme Court of the United States

October Term, 1996

WILLIAM KUCHINSKAS, et al.,
Petitioners,

vs.

BROWARD COUNTY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners were the plaintiffs at trial and the appellants on appeal. Respondent was the defendant at trial and the appellee on appeal. The parties will be referred to in this brief as "Petitioners" or "Plaintiffs" and as "Respondent" or "the County."

STATEMENT OF THE CASE

A. Course of Proceedings in the Trial Court. On June 18, 1991, pursuant to the Fair Labor Standards Act (FLSA), Plaintiffs filed a complaint in the Circuit Court of the Seventeenth Judicial Circuit of Florida, suing Broward County, Florida, and claiming entitlement to unpaid overtime compensation estimated at an amount in excess of $15,000,000, plus an equal amount in liquidated damages, attorney fees and costs. Pursuant to a notice of removal filed by the County, the case was removed to the United States District Court for the Southern District of Florida.

Pursuant to a joint motion by the parties, the issues relating to liability and damages were bifurcated for trial. The joint motion identified six issues as presenting questions of liability.

a. If Defendant required or permitted its executive, administrative and professional public employees to use accrued leave time to cover partial-day absences, did such a policy or practice destroy the "exempt" status of these employees, and if so for what period of time?

b. If Defendant required or permitted its executive, administrative and professional public employees to take leave without pay to cover partial-day absences, did such a policy or practice destroy the "exempt" status of these employees, and if so for what period of time?

c. If Plaintiff(s) did not suffer any actual deductions for partial-day absences, may they still recover back overtime pay for the period in which they were allegedly theoretically "subject to" such deductions?

d. Did Defendant's decision to prospectively change its partial-day absence policy and reimburse its employees who may have previously suffered partial-day pay deductions bring Defendant within the FLSA's so-called "window of correction" thereby absolving it of liability?

e. Effective September 6, 1991, did the addition of 29 C.F.R. § 541.5d to the Department of Labor's interpretive regulations governing overtime pay affirmatively make it permissible for public sector employees to require their "exempt" employees to use leave time and/or dock pay to cover partial-day absences?

f. If Defendant made improper deductions for partial-day absences, did such deductions only result in the loss of the overtime exemption for the employee whose pay was docked -- and then only for the workweek in which the deduction was made -- or did such deductions cause the entire Plaintiff class to lose its entire overtime exemption?

The parties entered into a joint pre-trial stipulation, which, other than six issues relating to liability, listed only the above six issues under the heading "REMAINING ISSUES OF LAW FOR THE COURT."

The stipulation listed only the following under the heading "FACTUAL ISSUES WHICH REMAIN TO BE LITIGATED."

1. The extent to which Plaintiffs were subject to a pay system which utilized paid, accrued leave to cover partial-day absences.

2. The extent to which Plaintiffs were subject to actual reductions in pay, not covered by leave time, for partial-day absences.

3. If Plaintiffs have been subject to a pay system that deducts for partial-day absences, did the Defendant act in good faith in operating such a system?

4. When were Defendant's personnel policies and practices clarified to not permit executive, administrative or professional employees' pay to be docked for absences of less than one day? And, when was the effective date of the clarification?

5. While it administered its pay system, did Defendant know or show reckless disregard for the matter of whether its conduct was prohibited by the FLSA?

6. If Plaintiffs are entitled to back overtime pay, how many overtime hours did each Plaintiff work during the compensable period?

7. If Plaintiffs are entitled to back overtime pay, at what rates of pay should they be compensated for these hours?

8. Is Plaintiff Janelle (Keith) Scott an "employee" of Defendant within the meaning of 29 U.S.C. §203(e)?

Following a bench trial, the trial court entered an order concluding that judgment should be entered in favor of the County. *Kuchinskas v. Broward County*, 840 F.Supp. 1548 (S.D. Fla. 1993).

The County submitted a proposed final judgment and Plaintiffs filed objections, asserting that the issue of job duties had not been tried. After judgment was entered, Plaintiffs filed a motion for new trial and again raised the job duties issue. The motion for new trial was denied.

Plaintiffs also filed a motion for sanctions against the County and its attorneys pursuant to Federal Rule of Civil Procedure 11.

Pursuant to Plaintiffs' motion for reconsideration, the trial court revised its findings with regard to a previous award of costs. In the same order, the court denied other pending motions, including Plaintiffs' motions for clarification and sanctions.

B. Statement Of The Facts.

1. Broward County's Payroll Practices. The evidence presented at trial indicates that Broward County's payroll system is characteristic of those that the Department of Labor (DOL) has found common in the public sector. As a political subdivision of the State of Florida, the County is required to methodically and precisely account for its expenditures, and to do so in a manner beyond ethical reproach. To satisfy these public accountability requirements, the County has long required its entire work force (including its highly-paid top administrators) to document their time worked on an hourly basis.

In most instances, the County's hourly reporting requirements were fulfilled through the daily completion of the time sheets. While the County's non-exempt employees have traditionally recorded their actual "hours worked" on their time cards, recording practices varied widely among the County's exempt personnel (who are also referred to in County documents as "job basis" and "open range" employees). Because exempt employees were not eligible for overtime, many simply accounted for their "regular" 7 ½ hour day; others recorded their actual time worked.

In keeping with the County's policy for hourly recordation of time, the County has also credited its employees with various forms of "leave time" in hourly increments. This time off, which includes sick leave and vacation pay, accrues into employees' "leave banks" at a rate of at least 7 hours biweekly.

While all Broward County employees accrued leave time in accordance with a set formula, policies concerning its used varied widely within the organization prior to September 1991. Given its size — Broward County is Florida's second largest county, with more citizens than twelve states — the County has always giving its 58 different organizational units significant discretion in administering personnel policies. Therefore, and not surprisingly, not all of the County's 6,300 employees (including 1,200 exempt personnel) were subject to exactly the same leave time policies.

One area where leave policies differed was on the then seemingly-insignificant matter of recording employee absences of less than one work day. A "partial day absence" might occur when an employee had a doctor's appointment during work hours, became sick during the workday, or wanted to take half of a vacation day. A few departments, although by no means most, also classified "tardiness" as constituting a partial-day absence.

To deal with such absences of less than a day, department administrators were expected to rely on the County's Civil Service Rules and other published County personnel procedures. However, these documents, drafted long before the County had to concern itself with federal oversight of its payroll practices, failed to include payroll rules governing the treatment of managerial, "white collar" employees.

In light of this ambiguity, various "ad hoc" practices developed among the different departments to handle managerial partial-day absences. However, one practice that was common throughout the County was to require (or at least expect) exempt employees who were absent for part of a workday to "flex their work schedule. Thus, if managerial employees arrived an hour late for work, they would stay beyond 5:00 p.m. However, the late-arriving employees also had an option: if it was not feasible for them to "make up" the time that day, or if they simply chose not to do so, the employees could "charge" the partial day absence to one of their accrued leave time banks, which were given to them for that very purpose.

Partial-day leave bank charges were common among the County's exempt personnel for personal absences.[1] What was uncommon, however, was a situation in which exempt employees who wished to charge their partial-day absence to a leave bank were out of accrued leave. Given the "generosity" of the County's leave program — at least 7 hours of credited leave every two week pay period — this accounting dilemma was more theoretical than actual.

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[1] As the parties stipulated, County employees never lost leave time, or actual pay, because the County lacked work for them to perform.

County Personnel Director Philip Rosenberg testified that he did not feel that it was appropriate under the Civil Service Rules to actually deduct pay from an exempt employee. Moreover, the parties stipulated that the heads of at least 36 of the County's 58 organizational units did not believe that the County's personnel rules and regulations required reductions in pay for partial-day absences by exempt employees, nor were there ever deductions in their departments.

Regardless of whether it was believed possible, the undisputed evidence at trial was that no exempt Broward County employee was ever "docked" pay for partial-day absence because he or she had exhausted accrued leave time. While the County has conceded that 7 of the 117 Plaintiffs -- and 73 of the more than 2,000 exempt County employees since 1988 -- have had deductions made for partial-day absences, Plaintiffs presented no evidence to prove the cause of any of these payroll errors.

2. Broward County's Compliance Efforts. Following this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), Broward County initiated a full-scale effort to review and revise its personnel policies and procedures to comply with the FLSA. In addition to conducting an extensive internal review, the County hired the labor law firm of Muller, Mintz to do a complete investigation of County payroll practices to ensure compliance with the Act. Muller, Mintz's investigation included contacting the Department of Labor for specific letter rulings. Mirroring the "national consciousness" existing at that time, however, the County's 1985 efforts uncovered no payroll practices inconsistent with the DOL salary test.

In the years subsequent to *Garcia*, the County continued its compliance efforts, systemically reviewing the exempt status of numerous County positions. These efforts intensified upon the 1989 appointment of Rosenberg as personnel director. Rosenberg, an experienced public sector personnel specialist, was well-acquainted with the FLSA and took aggressive steps to ensure the County's compliance with its provisions. These efforts included a "full-scale" review of County job classifications and a comprehensive examination of County payroll practices and procedures. Although Rosenberg

was an avid reader of personnel journals and an active participant in several management associations, neither he nor any other Broward County official believed that the County was in possible violation of the Department of Labor's "salary test."[2]

However, the Ninth Circuit's startling 1990 decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert.denied,* 498 U.S.1069 (1991), caused Rosenberg to reexamine the County's payroll practices. The *Abshire* decision, which rejected long-standing public accountability principles in favor of a total prohibition on deductions for partial day absences, spurred wide-scale discussion in the public sector. Rosenberg obtained legal advice from the County Attorney's office and began a comprehensive review of the County's partial-day absence policy.

Although Rosenberg did not believe that the County's existing absence and recordkeeping policies violated the FLSA, he nonetheless believed it would be in the County's interest to clarify its published timekeeping policies for exempt employees. Accordingly, Rosenberg initiated communications with several high-level Broward County administrators, such as Accounting Division Director Evan Lukic and Record Division Manager William Kuchinskas, to discuss possible changes in County personnel procedures.

Subsequent to these communications, the present suit was filed. While this action no doubt hampered the County's efforts to take remedial action, it prompted no change in the County's payroll policies. Instead, Rosenberg continued his efforts to review the County's existing policies and to monitor the ever changing legal landscape with the assistance of counsel.

By September 1991, Rosenberg was in a position to act decisively on the issues raised by *Abshire*. Rosenberg revised the County's Civil Services Rules and related personnel policies to ensure that

[2] Rosenberg's pre-*Abshire* "ignorance" of the salary basis loophole was typical of the belief of FLSA experts at the time. In the Fall 1990 issue of the Society for Human Resource Management's "Legal Report," which Rosenberg received, the former administrator of the DOL's Wage-Hour Division offered the following doomed prophesy: "[T]he salary requirement plays the least significant role in determining exempt status and the prospects are that unless the levels change it will play an ever decreasing role in determining exempt status."

exempt personnel could never lose pay as the result of a partial-day absence -- even in the unlikely even that their accrued leave time had been exhausted. The County's personnel rules were also clarified to ensure that exempt employees were not financially penalized for tardiness. After obtaining ratification for these rule changes from the County Commission, the revised regulations were published and distributed, and County managers and payroll clerks were given specific compliance training.

At the same time that it clarified its personnel policies, the County also began a comprehensive audit to determine whether any of its exempt employees had lost pay as a result of the County's previous — and widely divergent — payroll practices. After expending more than 1,000 staff hours and examing payroll records and time sheets for all exempt employees going back to 1988, the County determined that only 73 of its more than 2000 exempt employees had ever received a partial-day deduction.[3] These employees were promptly repaid with interest their lost wages — which, for the County's entire exempt work force, totaled only $11,039.

Following its September 1991 actions, the County continued its efforts to ensure FLSA compliance. In February 1992, the County further clarified its timekeeping policies to eliminate the need for many exempt employees to complete daily time sheets (R7:180-82; Defendant's Ex. 28, 30). In March 1992, after another California court determined that even charging leave banks for partial-day absences violated its interpretation of the salary basis test, the County completely suspended such charges. Finally, after the DOL's August 1992 rulemaking validated the County's pre-*Abshire* payroll practices, the County again revised its policies to allow for partial-day pay practices consistent with its public accountability objectives.

3. The Sanctions Motion. In his deposition, Scott Bugg, a Personnel Management Specialist for the County, in discussing the County's compliance efforts, testified that subsequent to *Abshire* and prior to the filing of the present suit, Rosenberg obtained legal advice. Bugg stated that such advice was obtained from the firm of

[3] The County's decision to go back to 1988 was a cost-benefit determination, made after assessing the period of legal liability and considering the enormous expense of reviewing the County's voluminous time records.

Morgan, Lewis and Bockius. It is undisputed that legal advice was obtained from the County Attorney's Office at that time.

At trial, after Plaintiffs' counsel read into the record a portion of Buggs' deposition that included the above statement, counsel for the County, who was from the firm of Morgan, Lewis and Bockius, read into the record a portion of the deposition that also included the statement.

In both a post-trial summation of evidence and a post-trial proposed findings of fact, counsel for the County included references to legal advice from Morgan, Lewis and Bockius, rather than from the County Attorney's Office. These pleadings also referred to Rosenberg's efforts as having the "consequence" of certain Plaintiffs filing the present suit.

C. Course of Proceeding in the Appellate Court. In an unpublished opinion (Petitioner's Appendix, p. 1-5), the Eleventh Circuit Court of Appeals affirmed the judgment. The court found that Plaintiffs had waived the issue relating to the job duties test because they failed to timely raise it in the trial court. The court also concluded that because the County met the requirements of the window of correction contained in 29 C.F.R. §541.118 (a) (6), it did not lose the FLSA exemption. That window provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." Relying on its prior decision in *Lee v. Flightsafety Services. Corp.*, 20 F.3d 428 (11th Cir. 1994), the court rejected Plaintiffs' argument that the window requires deductions to be both inadvertent *and* for reasons other than lack of work. The court pointed to the use of the word "or," rather than "and," in the provision in finding it to be disjunctive in nature. In light of this conclusion, the court noted that it did not need to address Plaintiffs' claim that the County failed to meet its burden of proof under the salary basis test. The court therefore did not deal with that issue.

The court also did not address Plaintiffs' other claims, including the one they made in their present petition regarding sanctions.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED ON THE BASIS OF CONFLICT AMONG THE COURTS OF APPEAL.

A. THIS COURT GRANTED CERTIORARI IN *AUER V. ROBBINS* TO CONSIDER QUESTIONS DIFFERENT FROM THOSE PRESENTED HERE AND THE GRANTING OF CERTIORARI IN THAT CASE THEREFORE IS NOT A BASIS FOR GRANTING CERTIORARI HERE.

Petitioners attempt to use the fact that this Court granted certiorari in *Auer v. Robbins*, case no. 95-897, as a basis for certiorari here. This attempt should be flatly rejected because the questions presented in the petition in *Auer* simply do not deal with the issues dealt with by the Eleventh Circuit in the decision under review.

Specifically, the questions presented in the petition in *Auer* were as follows:

1. Does the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, ("FLSA") salary basis test of "white collar" FLSA exemptions apply to public employees?

2. Do the United States Department of Labor ("DOL") FLSA salary basis regulations in 29 C.F.R. §§ 541.5d and 541.118(a) (5), which require the loss of exempt status when an employee is "subject to" nonsafety disciplinary suspension of less than a pay period apply only in cases of actual suspension or does DOL's interpretation that a personnel rule subjecting employees to discipline alone result in loss of exempt status control the application of the rule?

3. Do the DOL's "window of correction" rules in 29 C.F.R. § 541.118 (a) (6) allow an employer to treat a group of employees, police sergeants and lieutenants in this case, as exempt simply by revoking, a small portion of an offending disciplinary rule, which it had actually applied after

> the initiation of the litigation, to a member of the employee group, without revoking the more general "subject to discipline" rule and without actually restoring the lost compensation to the employee involved?

Petition for Writ of Certiorari in *Auer v. Robbins*, case no. 95-897, p.i.

Here, by contrast the *only* issue dealt with by the Eleventh Circuit relating to the manner in which the FLSA should be interpreted was the issue of whether the window of correction should be interpreted in the disjunctive, thus requiring either inadvertence or the fact that deductions are made for reasons other than lack of work, or in the conjunctive, thus requiring both issues to be met.

Thus, it is clear that certiorari was granted in *Auer* for reasons unrelated to the issue here.[4]

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[4] In the Brief for Petitioner in *Auer*, it is asserted that deductions must be inadvertent (pages 43-44). This does not change the fact that the granting of certiorari in *Auer* should have no impact on the petition here. In the first place, as noted above, this assertion has nothing to do with the questions on which certiorari was granted. Second, there is no argument or discussion presented in *Auer* as to whether the window is disjunctive or conjunctive in nature. Third, it is clear in *Auer* that no repayment was made. Rather, there was merely a promise to repay if such repayment was ordered by a court. Clearly, therefore, the issue is very different than the one presented here, where there is no dispute that repayment was made.

B. CERTIORARI SHOULD BE DENIED BECAUSE MOST OF THE CASES ALLEGED BY PETITIONER TO BE IN CONFLICT WITH THE DECISION HERE DID NOT CONSIDER THE ISSUE DEALT WITH BY THE PRESENT CASE, ONE OF THE CASES HAS BEEN VACATED, ONE IS IN EXPRESS AGREEMENT WITH THE DECISION HERE, AND THE ONLY ONE THAT CONFLICTS AT ALL DOES SO ON AN ISSUE THAT CAN HAVE VIRTUALLY NO IMPACT ON ANYONE OTHER THAN THE PARTIES TO THIS CASE AND THAT WILL HAVE NO IMPACT ON EVEN THE PARTIES BECAUSE THE DECISION HERE IS PLAINLY CORRECT AND BECAUSE RESPONDENT MUST PREVAIL UNDER THE FACTS OF THIS CASE REGARDLESS OF HOW THE LEGAL ISSUE IS DETERMINED.

Petitioners attempt to portray the decision of the Eleventh Circuit as one that is conflict with cases from numerous other circuits on the issue of whether the window of correction is disjunctive in nature. Analysis of the cases from the other circuits, however, reveals that for the most part the opinions did not even consider this question, that one of the opinions have been vacated, that one is in express agreement with the Eleventh Circuit and that the remaining opinion should not result in the granting of certiorari.

The case Petitioners refer to as being "most directly on point" (Petition for Writ of Certiorari, p. 18), *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2d Cir. 1991), *cert. denied*, 506 U.S. 905 (1992), doesn't even address the aspect of the window that deals with deductions made "for reasons other than lack of work." Indeed, even the court in *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279 (7th Cir. 1993), a case relied on by Petitioners, specifically noted that the court in *Malcolm* did not discuss this factor. 990 F.2d at 287.

Two of the other cases cited by Petitioners as being in conflict with the decision here, *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991) and *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993), fall into the same category as *Malcolm*. They do not even discuss the window as it relates to deductions made "for reasons other than lack of work." As is true regarding *Malcolm*, the court in *Klein* specifically noted this fact

with reference to *Abshire*. Moreover, the dictates of *Abshire*, whatever they are said to be, are no longer good law in light of the Ninth Circuit's subsequent decision in *Service Employees International Union v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1995), cert. denied, 116 S.Ct. 794 (1996)

Petitioners additionally claim conflict with *Balgowan v. New Jersey*, 84 F. 3d 656 (3d Cir. 1996). Reference to that citation, however, reveals no opinion on the merits. Rather, there is merely an order granting rehearing and vacating an opinion that had been published in the advance sheets. It goes without saying that such an order cannot form a basis for the granting of certiorari.

Petitioners also allege conflict with the decision of the Eighth Circuit in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S. Ct. 2545 (1996). The decision in that case, however, specifically states that "the regulation is written in the disjunctive," 65 F.3d at 711, n.7. and cites to the opinion in *Lee v. Flightsafety Services Corp.*, 20 F.3d 428 (11th Cir. 1994), the case followed by the Eleventh Circuit in the present case in support of its finding. Thus, *Auer* does not conflict with the present case on this issue. Rather, the cases are in total accord.

The only other case cited by Petitioners as being in conflict with the decision here, *Klein*, does reach a conclusion contrary to that reached in the present case. This fact should not be deemed a basis for the granting of certiorari, however. This is due for a number of reasons.

1. On August 19, 1992, subsequent to the time frame relevant to the present case, the Department of Labor published its Final Rule on the public section salary test. 29 C.F.R. § 541.5d. It provides that public sector employees who would otherwise be exempt from the FLSA's overtime requirements do not lose their exemption because their pay is subject to reduction for partial-day absences. Thus, the issue dealt with in the present case and in *Klein* only applies to factual scenarios arising before August 19, 1992. Moreover, since the limitation period for claims of the sort dealt with by these cases is three years, no new cases raising this issue can be filed. Thus, resolving the conflict will impact only on the litigants to the present

case and whatever few pre-1992 cases may still remain in the system. The limited impact of a decision regarding this matter therefore demonstrates that this is not an appropriate subject for certiorari.

2. It is clear that the decision in the present case is correct as a matter of law and that the decision in *Klein* is incorrect. The window of correction uses the word "or," a word that is plainly disjunctive. In *Lee* the court relied on the basic principle that "[a] court should presume that regulations mean what they say." 20 F.3d at 433. Based on this indisputable premise, the court found that reading the provision conjunctively would constitute a "judicial rewriting of the regulations" and would be "improper." *Id.* In *Klein*, by contrast, the court essentially admitted that it was engaging in the improper process of rewriting the regulation by specifically relying on its own subjective opinion that "a better reading of the regulation would take these conditions conjunctively." 990 F.2d at 287. It seems clear that the plain wording of the regulation must take precedence over a court's opinion that it would prefer some other interpretation.

Not only is the Eleventh Circuit's approach to this question clearly preferable to that of the Seventh Circuit, but it is also endorsed by the Sixth Circuit, which appears to be the only other circuit to consider the question. *See Martin v. W.E. Montes & Co.*, 1993 WL 300332 (6th Cir. 1993).

Thus, the weight of both logic and authority support the decision reached in the present case, while the approach in *Klein*, on the other hand, is plainly incorrect. Under these circumstances, there is no need to grant certiorari.

3. Another reason why certiorari should not be granted here is the fact that even if Petitioners' position is accepted, and the window is found to be conjunctive in nature, the window would still apply to the facts of this case. Thus, the Eleventh Circuit's decision will be upheld regardless of the disposition of the legal question.

The reason why the window would apply is that both prongs of the window have been met. There is no dispute that the deductions were for reasons other than lack of work. Moreover, it is also apparent that they must also be deemed to be inadvertent. The deductions

here were not a matter of policy, but were isolated occurances, the reasons for which were not established at trial. Only 3.65 per cent (73 of 2,000) executive, administrative and professional employees had actual deductions and the total amount deducted was just $11,039.

Where deductions are not the result of an express policy, they are inadvertent. *See Hurley v. Oregon*, 27 F.3d 392, 395, n.7 (9th Cir. 1994); *Barner v. City of Novato*, 17 F.3d 1256, 1263 (9th Cir. 1994). Additionally, in the present case, it should be realized that the deductions here were made against the backdrops of the uncertainty and confusion in the law existing at the time. As noted by the trial court, "a strong argument" could be made that this factor alone could support a finding of inadvertance. (Petitioners' Appendix, p. 25, n. 6; *Kuchinskas v. Broward County*, 840 F. Supp. 1548, 1557, n. 6 (S.D. Fla. 1993). Couple with the lack of express policy, such a conclusion is inescapable.

C. THE QUESTION OF WHETHER THE ELEVENTH CIRCUIT'S INTERPRETATION OF THE SALARY BASIS TEST REGULATION CONFLICTS WITH THAT OF OTHER CIRCUITS IS IMMATERIAL TO THE PRESENT CASE BECAUSE THIS QUESTION WAS NOT PRESENTED BELOW, WAS NOT DEALT WITH BELOW, AND CANNOT ARISE UNDER THE FACTS HERE.

A close reading of Petitioners' argument regarding this claim reveals that at no point do Petitioners assert that the decision in the present case conflicts with decisions of other circuits on the question of whether actual docking of pay is necessary to prove that employees were "subjected" to impermissible docking. Rather, Petitioners simply claim that the Eleventh Circuit conflicts with other circuits in this regard.

Petitioners' clever wording in this regard is clearly the result of one simple factor. The Eleventh Circuit never addressed this issue in the previous case. Indeed, it was never raised and is not an issue in any event because deductions did occur here.

Petitioners' claim therefore backs down to a contention that the Eleventh Circuit's decision in two other cases, *Avery v. City of*

Talladega, 24 F.3d 1337 (11th Cir. 1994) and *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800 (11th Cir. 1991), conflict with decisions from other circuits. Plainly, even assuming such conflict to exist, a point on which Respondents take no position, no basis exists to grant certiorari in the present case.

D. THERE IS NO CONFLICT BETWEEN THE DECISION HERE AND DECISIONS IN OTHER CIRCUITS ON THE QUESTION OF THE NEED TO PROMISE FUTURE COMPLIANCE WHEN THE PRESENT CASE DEALS WITH A SITUATION IN WHICH THERE IS NO REGULATION TO BE COMPLIED WITH IN THE FUTURE AND IN WHICH, UPON LEARNING OF THE IMPROPER DEDUCTIONS, THE COUNTY ADOPTED A POLICY IN COMPLIANCE WITH THE FLSA.

It is clear that the Eleventh Circuit's decision is both correct and unaffected by the cases cited by Petitioners. First, it is undisputed that the regulation with which Respondent did not comply is no longer in effect. Thus, as the appellate court noted, "Obviously, the County need not promise to comply with the out-of-date regulation. (Petitioner's Appendix, p. 5, n. 3)." Moreover, it is clear that Respondent, when it learned of the improper deductions, responded by adopting a policy in compliance with the FLSA. Such compliance demonstrates the promise contemplated by the regulation. *See Intl. Assn. of Firefighters, Alexandria Local 2141 v. City of Alexandria*, 720 F.Supp. 1230, 1232 (E.D. Va 1989); *Hartman v. Arlington County*, 720 F.Supp. 1227, 1230 (E.D. Va 1989). The cases cited by Petitioners deal with an entirely different situation, disciplinary docking, than what is presented here. They also do not address the effort of the adoption of a new policy in compliance with the FLSA. They are thus not relevant to the issue here.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION HERE IS PLAINLY CORRECT AS TO EACH POINT OF LAW RAISED BY PETITIONERS, THOSE POINTS OF LAW ARE FACT-SPECIFIC AND INVOLVE THE APPLICATION OF SETTLED PRECEDENT, NOT IMPORTANT QUESTIONS OF FEDERAL LAW, AND PETITIONERS' ASSERTIONS AS TO THESE MATTERS AMOUNT TO NO MORE THAN AN EFFORT TO OBTAIN A SECOND APPEAL.

A. THE INTERPRETATION OF THE SALARY BASIS TEST CAN HAVE VIRTUALLY NO IMPACT ON ANYONE OTHER THAN THE PARTIES TO THIS CASE AND WILL HAVE NO IMPACT ON EVEN THE PARTIES BECAUSE THE DECISION HERE IS PLAINLY CORRECT AND BECAUSE RESPONDENT MUST PREVAIL UNDER THE FACTS OF THIS CASE REGARDLESS OF HOW THE LEGAL ISSUE IS DETERMINED.

Respondent has previously discussed in section I (B) of the argument portion of this brief fact that this issue will have almost no effect on anyone other than the parties to this case in light of the subsequent changes in the law as well as the fact that the case really won't even effect the parties because the Eleventh Circuit's conclusion is plainly correct and because, under the facts of the present case, Petitioners would not prevail even if their legal position was to be accepted. Respondent's previous discussion of these factors is hereby incorporated and reasserted in response to this claim. These factors plainly demonstrate that the issue is not one of importance that should be considered by this Court in this case.

B. THERE IS NO BASIS TO GRANT CERTIORARI WITH REGARD TO PETITIONERS' CLAIM RELATING TO THE JOB DUTIES TEST BECAUSE THE DECISION UNDER REVIEW DOES NOTHING MORE THAN APPLY WELL-SETTLED WAIVER PRINCIPLES TO THE SPECIFIC FACTS OF THIS CASE AND BECAUSE THE DECISION CORRECTLY APPLIES THOSE PRINCIPLES.

Petitioners make no serious effort to demonstrate that this issue presents an important question of federal law. Rather, they simply reargue the merits of their claim, one that is very fact specific to this

case, in the hope of receiving a second appeal. Quite clearly , a claim that certiorari should be granted to consider the question of whether the specific actions taken by Petitioners in the trial court constituted a waiver warrants little discussion. The law regarding waiver is not disputed. The only question is whether that law applies to the unique set of facts presented here, a set of facts unlikely to recur in any other case. Clearly, certiorari is not appropriate as to this claim.

In any event, it should also be noted that Petitioners' contentions are plainly without merit. In both a joint motion for bifurcation and a joint pretrial stipulation, Petitioners agreed that there were six specifically delineated issues to be tried relating to liability, none of which related to whether the job duties test was met. Further, Petitioners never articulated any dispute with the statement in Respondent's pretrial memorandum of points and authorities that there was no dispute that the job basis test was met and that Petitioners' claim was based solely on the issue of whether they were compensated on a salary basis. In addition, as noted by the appellate court (Petitioners' Appendix, p. 3, n 2), when Respondent's attorney made comments during opening statement and in making a later objection that the job duties test was met and was not at issue, Petitioners voiced no dispute. Rather, Petitioners did not assert their claim in this regard until after the trial court entered its order indicating that judgment should be entered in favor of Respondent.

There seems little question that the doctrine of waiver applies to these facts. Moreover, the doctrine of estoppel would also seem applicable since it was Petitioners' action that reasonably led Respondent to believe that the job duties test was not at issue. In any event, it is certainly clear that there is a sufficient basis to support the appellate court's conclusion and that this Court therefore should not consider this matter.

C. THERE IS NO BASIS TO GRANT CERTIORARI WITH REGARD TO PETITIONERS' CLAIM RELATING TO SANCTIONS, A CLAIM THAT WAS NOT DISCUSSED BY THE APPELLATE COURT, WHEN PETITIONERS FAILED TO MAKE THE ATTORNEYS WHOSE CONDUCT WAS QUESTIONED PARTIES TO THE APPEAL, WHEN THE ISSUE DEALS ONLY WITH THE APPLICATION OF WELL-SETTLED LAW REGARDING SANCTIONS AND WHEN THE CONCLUSION THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO IMPOSE SANCTIONS WAS PLAINLY CORRECT.

As is true with regard to Petitioners' claim relating to the job duties test, this point is nothing more than an effort to obtain a second appeal. Petitioners' argument is simply that the appellate court was wrong in applying the law to the unique facts of this case, facts that are unlikely to recur. By no means is such an assertion a proper basis for the granting of certiorari.

Nonetheless, it should also be realized that it is clear that Petitioners' claims were properly rejected by the appellate court. This is true for two reasons.

First of all, Petitioners assert that sanctions should have been imposed on the attorneys representing Respondent, but failed to make those attorneys parties to the appeal. An appeal from an order imposing sanctions on an attorney must be taken in the name of the attorney, not the party represented. *See Collier v. Marshall, Dennehey, et al.*, 977 F.2d 93 (3d Cir. 1992); *May v. Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990); *Rogers v. National Union Fire Ins. Co.*, 864 F.2d 557 (7th Cir. 1985); *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427 (2d Cir. 1988). The same logic dictates that when appeals are taken from a denial of a motion for sanctions on attorneys, the attorneys must be named as parties. If they are not, they will have no opportunity to defend themselves. Petitioners' failure in this regard waived their right to have this matter considered.

Second, it is clear that the trial court did not abuse its discretion in not imposing sanctions. A ruling on a motion for sanctions will be reversed only when such an abuse_is shown. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Petitioners' entire argument as well as their Statement of the Case gives no discussion of the facts that formed the basis for the motion for sanctions. Review of those facts demonstrate the total lack of merit to Petitioners' claims. The motion was based primarily on deposition testimony to the effect that Respondent had obtained legal advice from the law firm of Morgan, Lewis and Bockius prior to the filing of the present case, when in fact that advice was obtained from the County Attorney's Office. There is no question, however, that the pertinent point was that legal advice had been obtained, not from whom it was obtained. Clearly, the discrepancy here was not a material one, was incidental to the dispute and was not intended to mislead. Moreover, the testimony in question was first brought out at trial by Petitioners' attorney. Under these circumstances, it cannot be said that the appellate court was in error in finding that the trial court did not abuse its broad discretion.

Finally, it should be remembered that even if sanctions were appropriate, they would have no affect on the outcome of the case with regard to the parties. Thus, this factor provides another basis to deny the petition in this case.

CONCLUSION

Based upon the foregoing, Respondent respectfully submits that the petition in this case should be denied.

Respectfully submitted,

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